IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 186 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA : Sd/-

HONOURABLE MR.JUSTICE KS JHAVERI : Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ARJUNSINH KHUMANSINH - Appellant(s)

Versus

STATE OF GUJARAT - Opponent(s)

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Appearance :
MS REKHA H KAPADIA for Appellant(s) : 1,
MS ML SHAH APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 27/09/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1. This appeal under Section 374 of the Code of Criminal Procedure has been preferred by the present appellant-accused being aggrieved and dissatisfied by the judgment and order of conviction dated 04.01.1999 passed by the learned Additional Sessions Judge, Bharuch, whereby he was sentenced to undergo rigorous imprisonment for life for the charge under Section 302 of the Indian Penal Code and also sentenced to undergo seven days simple imprisonment for the charge under Section 504 of the Indian Penal Code.

2. The case of the prosecution in short is that the appellant-accused and the deceased were the husband and wife and residing together in their matrimonial house in Bharuch district along with the children. The appellant-accused was doing plumbing work and as per the complaint, her husband left the house on 23.07.1997 in the morning and came back on

24.07.1997 at about 6:30 a.m. and, thereafter, altercation took place between them and appellant abused and started giving kick and fist blow to her and, thereafter, sprinkled kerosene and ignited her. As a result of that, she received severe burn injuries. On raising screams, her mother viz., Savitaben, her brother viz., Alpesh and one Sushilaben reached the scene of offence and tried to help her. Thereafter, she was taken to Civil Hospital, Bharuch, wherein she was admitted as an indoor patient. Dr.Rashmikant C. Mehta (P.W.No.12, Exh.37), who was on duty had inquired regarding the incident from the victim. She, in turn, categorically narrated that her husband beat her by giving kick and fist blow and, thereafter, sprinkled kerosene and ignited her and as a result of that, she received burn injuries. Accordingly, same has been noted down upon the case papers. In turn, Dr.Mehta also informed the Police Constable, who was discharging his duty at Civil

Hospital regarding the incident. In turn, the Police Constable by way of telephonic message informed 'A' Division Police Station, wherein P.S.O. noted down the same in the Station Diary as Entry No.8/1997 and handed over the investigation to P.S.I., Shri C.S. Jadava along with the copy of station diary and yadi. In pursuance of that, P.S.I. went to Civil Hospital, Bharuch, where the victim was being treated and inquired from her regarding the incident and, thereafter, recorded the complaint given by her and, thereafter, same was sent along with report to P.S.O. 'A' Division Police Station for the purpose of registration of the offence. In pursuance of that, offence came to be registered as Bharuch 'A' Division Police Station I-C.R.No.216/1997 under Section 307 and 504 of the Indian Penal Code and under Section 135 of the Bombay Police Act. Further investigation was entrusted to P.S.I., Shri C.S. Jadav (P.W.No.8, Exh.23). In pursuance of that, he went to the scene of offence,

drew the scene of offence panchnama in the presence of panchas, seized the muddamal from the place of panchnama by preparing panchnama and recorded the statements of various witnesses including relatives, neighbours and other witnesses. During the course of investigation, P.S.O. 'A' Division Police Station received telephonic vardhi from the Constable, who was discarding his duty at Bharuch Civil Hospital that the victim succumbed to the injuries on 24.07.1997. In pursuance of that, inquest panchnama was drawn in the presence of panchas and made arrangement to send the dead body for the purpose of postmortem and, thereafter, Section 302 was added and also sent yadi to that effect into the Court. As the appellant-accused had also received injuries, he took treatment from the same hospital as an indoor patient on 31.07.1997 and after discharge, he was arrested and sent into judicial custody. Thereafter, muddamal was sent to FSL with forwarding letter. On receiving the FSL

report, same was kept with investigation file along with the P.M.Note and other certificate.

3. At the end of investigation, chargesheet came to be submitted before the Court of Learned Chief Judicial Magistrate, Bharuch. As the offence was exclusively triable by the Court of Sessions, same was committed to the Court of Sessions, Sabarkantha @ Himmatnagar, which came to be numbered as Sessions Case No.174/1997 and transferred into the Court of Learned Additional Sessions Judge, Bharuch.

4. On production of the accused, the learned Additional Sessions Judge framed the charge against the appellant-accused, wherein he pleaded not guilty and claimed to be tried.

5. To prove the guilt against the accused, prosecution examined, in all, 8 witnesses and also placed reliance upon documentary evidence numbering 14.

6. On submission of closing purshis by the prosecution, learned Judge recorded further statement of the accused under Sec.313 of

Code qua the incriminating question wherein the accused came out with the case of total denial stating that at the time of incident, he was not at home and went for fetching potable water. Therefore, after hearing the learned counsel appearing for the respective parties, learned Addl. Sessions Judge delivered the impugned judgment giving rise to prefer the present appeal.

7. We have heard learned counsel, Ms.R.H. Kapadia for the appellant-accused and learned Additional Public Prosecutor, Ms.M.L. Shah for the State.

8. It has been mainly argued by the learned counsel for the appellant-accused, Ms.R.H. Kapadia that the appellant-accused is totally innocent and has been falsely involved into the crime in question. It has been further argued that at that time of incident, he was not at home as he went to fetch potable water and after hearing shout for help, he reached the scene of offence to rescue her. As a result of that, he himself received serious

burn injuries and for which, he was admitted in the hospital and treated as indoor patient till 31.01.1991 and even said fact has also been told by the victim to the Executive Magistrate. It has been argued that the material witnesses i.e. the relatives of the deceased have not supported the case of the prosecution and in absence of that, there are no other evidence to connect the accused with the crime in question and case of the prosecution is based only on the three alleged dying declarations. According to her, looking to the injuries received by the deceased, she was not in a position to give dying declaration. Not only that, she has argued further that the dying declaration does not have any endorsement of the doctor regarding ability of the victim in giving dying declaration. Lastly, it has been argued that there are two children, who have lost their mother and that their father is in judicial custody since long as convict prisoner. It is further argued that at the

most, it can be treated as a case of sudden provocation as he has already undergone more than sentence of 11 years and, hence, he may be given benefit.

9. Ms.M.L. Shah, learned Additional Public Prosecutor, who appears on behalf of the respondent-State has taken us through the reasoning of the learned Additional Sessions Judge. After taking us through the evidence of material witness i.e the evidence of Dr.Rashmikant Chimanlal Mehta (P.W.No.5, Exh.13), who has initially treated and examined the victim at about 8:10 a.m. in the morning and noted down the history upon the case papers given by the victim, it is argued that this witness deposed same in toto before the Court and also identified his hand writing, endorsement etc. upon the dying declaration. Over and above, he has categorically deposed before the Court that the victim was conscious, was able to understand and able to speak. After showing the dying declaration, it has been shown that

physical condition of the victim was good and endorsement to that effect is there upon the case papers i.e. fair and good on 24.07.1997. It has been argued that even prosecution gets support from other two dying declarations, one which has been recorded by the Executive Magistrate, Shakuntalaben Satishkumar Mehta, Exh.9 and one by way of FIR. It has been argued that all the dying declarations are trustworthy, free from doubt and even as per the endorsement made by the Dr.Mehta, from which, it appears that at the time of recording the dying declaration, the deceased was conscious and able to understand, speak and can give the dying declaration. It has been argued that now law is settled on this issue that if the dying declaration does not have any endorsement of the doctor, only on that ground, the prosecution case will not be thrown out. Over and above, the learned Additional Public Prosecutor, Ms.Shah has also placed reliance upon the three judgments reported in 2002(6) SCC 710 in the case of

Laxman V/s. State of Maharashtra, 2002(7) SCC 425 in the case of Dhanraj & Ors. V/s. State of Maharashtra and 2002(8) SCC 83 in the case of Rambai V/s. State of Chandigarh. Ms.Shah has, therefore, urged that the learned trial Judge was perfectly justified in coming to the conclusion that the appellant-accused has committed the crime. Raising the abovesaid contentions, Ms.Shah has urged that the present appeal deserves to be dismissed.

10. We have gone through the oral as well as documentary evidence and the reasoned judgment delivered by the Court below shown to us by the learned counsel for the respective parties.

11. It is required to be noted that the case of the prosecution is based only on the dying declaration. It is required to be noted that all important witnesses i.e. the neighbour and relative of the deceased have not supported the say of the prosecution and have been declared hostile. But the facts remain that the deceased and the appellant-accused

were husband and wife having two children and residing together. It is also established from the scene of offence panchnama, Exh.18 that the incident in question took place in the matrimonial house at about 6:30 a.m. on 24.07.1997. It is also established from the evidence on record that the deceased as well as appellant both received burn injuries and were admitted in the Civil Hospital, Bharuch. It is also proved by the prosecution that during the course of treatment, the victim succumbed to the injuries on 29th and, therefore, Section 302 was added. At the cost of repetition, we make it clear that case of the prosecution is based on dying declarations only and, therefore, we would like to go through the same one by one.

12. First dying declaration is in the form of history given by the deceased in Bharuch Civil Hospital upon the case papers of the victim, which has been proved by Dr.Rashmikant Mehta (P.W.No.5, Exh.12). Dr.Mehta has categorically deposed the same

before the Court on oath and also proved the history noted down by him upon the case paper at Exh.14 and nothing adverse came on record. Not only that Dr.Mehta has also proved the injuries of the deceased and also proved the postmortem, Exh.13. He has categorically deposed that at the time of giving history, she was able to speak and was conscious. Over and above, it reflects from the evidence on record that since Mr.Mehta found it to be a medico-legal case, he immediately informed the Police Constable, who was on duty at Civil Hospital, Bharuch and, in turn, the Police Constable has telephonically sent vardhi to 'A' Division Police Station, wherein also, the history narrated before him has been reflected in toto (Exh.21). So immediately, the Medical Officer informed 'A' Division Police Station regarding the incident. In pursuance of that, offence came to be registered against the present appellant-accused and, thereafter, the investigation has been handed over by the

P.S.O. to P.S.I., Shri Jadav, who in turn went to hospital and inquired from the complainant regarding the incident and recorded the complaint, Exh.24 given by the victim repeating the history given before the doctor and sent for the purpose of registration to Police Station.

13. Second dying declaration is in the form of complaint (Exh.24) recorded by the P.S.I., Mr.Jadav (P.W.No.8, Exh.23) Mr.Jadav deposed before the Court in toto. Not only that, he has categorically deposed that at the time of recording the complaint, the victim was conscious, was able to speak and he recorded the complaint as given by the victim and same has been proved by the prosecution at Exh.24.

14. There are evidence on record that after registration of the complaint, the P.S.I., Shri Jadav sent yadi to Executive Magistrate for the purpose of recording the dying declaration of the deceased. In pursuance of that, the Executive Magistrate viz., Shakuntalaben Satishbhai Mehta (P.W.No.4,

Exh.9 reached Bharuch General Hospital, contacted the victim and after verifying her physical condition and ability to give dying declaration recorded the dying declaration of the victim, Exh.11. In short, this is the third dying declaration of the victim recorded by the Executive Magistrate. She has categorically deposed that she has been taken to the bed of the victim by Dr.Mehta and before recording the dying declaration of the victim, she has taken sufficient care and caution and, thereafter, recorded her dying declaration. Not only that, she has categorically deposed before the Court that at the time of recording the dying declaration of the victim, she was conscious, able to speak and she could give dying declaration and, thereafter, same has been recorded.

15. We have gone through the dying declaration, Exh.11, which is in question answer form and which totally supports the say of the prosecution. In short, there are three dying

declarations on record and to prove all three dying declaration, the prosecution has examined above referred witnesses. We have gone through the evidence of above referred witnesses along with their cross-examination and we are fully satisfied that at the time of recording all the three dying declarations, the physical and mental condition of the deceased was good, she was able to speak and she was able to give dying declaration and, therefore, the contention raised by the learned counsel for the appellant-accused that the victim was not conscious and she was not able to give dying declaration is required to be discarded.

16. As far as the contention raised by the learned counsel for the appellant-accused regarding not obtaining endorsement upon the dying declaration by the Executive Magistrate is concerned, if we consider the evidence of Dr.Mehta, who has given detailed evidence qua the same, it reflects from the evidence of Dr.Mehta that he has categorically made

endorsement upon the yadi, Exh.10, wherein he has made endorsement that the patient is conscious and able to speak and signed the same. Over and above, as per the deposition of the Executive Magistrate, Shakuntalaben Satishbhai Mehta, who herself took her to the bed of the victim, has recorded the statement.

17. As far as the endorsement is concerned, law on this point is settled and, hence, no discussion is required to be done then also, we rely upon judgment reported in 1999(1) G.L.H. 94, (2002)6 SCC 710, and AIR 2005 SC 97

18. In view of the above, we do not find any substance in the arguments of the learned counsel for the appellant that dying declaration is not trustworthy and free from doubt. We are of the opinion that the prosecution is able to prove all the three dying declaration beyond reasonable doubt and also connect the accused with the crime in question. It is also established that at the

time of incident, the appellant was at residence and quarrel took place between them and, thereafter, he sprinkled kerosene and ignited her and as a result of that, she succumbed to the injuries. Merely, because the relatives of the deceased or neighbours have not supported the case of the prosecution, prosecution case cannot be thrown out. Law on this point is clear that if dying declaration is trustworthy and free from doubt, then conviction can be based only on the said dying declaration and it does not require any corroboration.

19. In view of the above, since there is no substance in any of the arguments advance by the learned counsel for the appellant-accused, this appeal is required to be dismissed.

20. In the result, Criminal Appeal is dismissed. The appellant-accused viz., Arjunsinh Khumansinh is on bail and, hence, his bail bond shall stand cancelled. He is directed to surrender before the Jail Authorities within

two months from today.

Sd/- Sd/-
(R.P.DHOLAKIA, J.) (K.S.JHAVERI, J.)

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